NSW Crest

Supreme Court
New South Wales

- Amendment notes

Medium Neutral Citation:
In the matter of Courtenay House Capital Trading Group Pty Ltd (in liq) [2018] NSWSC 604
Hearing dates:
04 May 2018
Decision date:
04 May 2018
Jurisdiction:
Equity
Before:
Leeming JA
Decision:

1. Dismiss the interlocutory process filed this afternoon.
2. Grant the parties liberty to apply to my Associate in the first instance on short notice for the period of the next seven days and thereafter on 24 hours' notice to the Company Judge.
3. The first defendant, Mr Iervasi, to pay the liquidators' costs of the interlocutory process.

Catchwords:
CORPORATIONS – winding up – examination by liquidators – application for examination to be held in private – whether "special circumstances" established – no pending prosecution of director – likelihood of criminal prosecution – whether publicity in mass media and social media of answers to questions might prejudice fair criminal trial – substantial pre-existing publicity – availability of steps to address risk of unfair trial, including potential for application for judge alone trial – special circumstances not established – application dismissed
Legislation Cited:
Corporations Act 2001 (Cth), s 597
Courts Suppression and Non-Publication Orders Act 2010 (NSW), s 7
Criminal Procedure Act 1986 (NSW), s 132
Cases Cited:
Corporate Affairs Commission (NSW) v Lombard Nash International Pty Ltd (NSW) (No 4) (1987) 12 ACLR 475.
Friedrich v Herald and Weekly Times Ltd [1990] VR 995

In the matter of Courtenay House Capital Trading Group Pty Ltd [2017] NSWSC 467
In the matter of Courtenay House Capital Trading Group Pty Ltd [2017] NSWSC 883
Re Eurostar Pty Ltd (In Liquidation) (Receivers and Managers Appointed) [2004] NSWSC 462
Evans v Wainter Pty Ltd (2005) 145 FCR 176; [2005] FCAFC 144
Wambo Coal Terminal Pty Ltd v Shepard [2011] NSWSC 639; 84 ACSR 660

Category:
Procedural and other rulings

Parties:
Tony Iervasi (Applicant)
John McInerney (First Respondent)
Said Jahani (Second Respondent)

Representation:
Counsel:
A Hopkins (Applicant)
D Robertson (Respondents)

Solicitors:
Jenna Lewandowski (Applicant)
Colin Biggers & Paisley (Respondents)

File Number(s):
2017/388148

Publication restriction:
Nil

EX TEMPORE Judgment

1. **HIS HONOUR**: By interlocutory process filed in Court this afternoon, Mr Tony Iervasi seeks orders directed to the conduct of a liquidator's examination which is to be heard commencing at 11am next Monday 7 May 2018. The examination may, I have been told, take some days. The orders that are sought are orders that the examination be held in private, that it not be transcribed and authenticated as contemplated by s 597(13) of the *Corporations Act 2001* (Cth) and that there be an order that any transcript or recording of the examination be suppressed or the subject of a non-publication order under s 596F(1)(e) and/or s 7 of the *Courts Suppression and Non-Publication Orders Act 2010* (NSW).

2. It is now 3.47pm on the Friday afternoon and I have had the benefit of evidence and submissions from Mr Hopkins of counsel who appears for Mr Iervasi, having as I understand it only recently been briefed, and Mr Robertson of counsel who appears for the liquidators and who, with Ms Whittaker, will be conducting the examinations next week.

3. In the circumstances, and in particular because at the heart of the submissions propounded by both sides has been the extensive public interest to date in the liquidation of Courtenay House Capital Trading Group Pty Ltd and Courtenay House Pty Ltd, it seems appropriate for me as best I can to provide reasons, even though necessarily they will be less complete than otherwise they might have been.

4. Mr Iervasi was the sole director of both companies in liquidation, namely, Courtenay House Capital Trading Group and Courtenay House. In April last year freezing orders were made by this Court: *In the matter of Courtenay House Capital Trading Group Pty Ltd* [2017] NSWSC 467 and in May liquidators were appointed to both companies on the application of ASIC: *In the matter of Courtenay House Capital Trading Group Pty Ltd* [2017] NSWSC 883. The summons requiring Mr Iervasi's examination next Monday was obtained at the end of January 2018 and was served upon Mr Iervasi on about 8 February 2018, almost three months ago.

5. I have been taken to evidence, which is entirely uncontroversial and relied upon by both sides, as to the publicity which to date has been given to Mr Iervasi's involvement in these companies. That includes a prominent front page story on the Daily Telegraph of 22 November 2017, with the heading, "The Wolf of Oxford Street" and "Exclusive: Australia's biggest Ponzi scam". There has been a deal of media attention in Australian and international reporting organisations, which need not be summarised for present purposes, save to say that it is critical of Mr Iervasi expressly and by implication.

6. Mr Iervasi has not been charged. At one stage it was put that his being charged was imminent, but there is no evidence before me of that, and very properly Mr Hopkins has confirmed that his submission is merely that serious criminal charges are inevitable.

7. The primary application that is made today is that in paragraph 4 of the interlocutory process, namely, that Monday's examination be held in private.

8. As refined in argument, Mr Iervasi concedes that in the ordinary run of things liquidator's examinations are to be held in public and that an onus lies upon him to establish "special circumstances" within the meaning of s 597(4) of the *Corporations Act* for some other course to take place. Mr Iervasi relies upon a series of communications with the liquidator and with ASIC over the last year, directed to establishing that in the event that criminal proceedings are brought and there is a trial by jury, then he will suffer real prejudice. The reason for the prejudice, so it is submitted, is that there will be reporting of the questions asked of him and his answers which will be of an entirely different character from that which already has been reported and continues to be available on the internet and through forms of social media. He makes the point that there is a very significant difference, particularly in the context of a possible criminal trial, between a newspaper report which refers to allegations of serious criminality, such as the "Ponzi" scheme which is said to have been operated by the two companies of which he was the sole director, and evidence of answers that he will be obliged to give to the liquidators when the examination takes place next week. The submission is well made. I do not accept that the mere fact that there has to date been a great deal of publicity adverse to Mr Iervasi and linking him to what is said to have been a "Ponzi" scheme of itself precludes a finding of special circumstances. That said, I cannot ignore the fact that *any* trial before a jury will be attended by risks associated with jurors recalling, or accessing, the material which is already available online, irrespective of the outcome of the present application.

9. I should interpolate that Mr Iervasi has, throughout the application today, made it plain that he does not seek to interfere with the liquidators conducting the examinations pursuant to the orders obtained in January of this year, but rather seeks to avoid what he says is the prejudice that will arise in the event there is a criminal trial, unless the orders as to the examination being held in private and the ancillary orders directed to suppressing the authenticated transcript be made.

10. Contrary to another submission advanced by the liquidators, I am prepared to proceed, for the purposes today, on the basis that, as Mr Iervasi contends, there is an inevitability, or at least a near inevitability, of his being charged with serious criminal offences at some stage in the future arising out of the events as to which the examination on Monday will be directed to. Of course so to find does not mean that there will be a jury trial, a point to which I will return.

11. The liquidators oppose all of the orders sought by Mr Iervasi. The liquidators' position is that this examination, like most, should be conducted in public, and that there is a public interest in failed companies and the circumstances which led to the failure being ventilated in public. The liquidators point to particular facts in these two windings-up illustrating that public interest. The liquidators adduce evidence that on 29 March 2018 in related proceedings, which are being case managed by Brereton J, between 30 and 40 persons, excluding legal representatives, attended court, so much so that the hearing was paused to permit additional chairs to be found for those persons. The liquidators also advise that they have been receiving enquiries from the companies' creditors in the last few weeks as to when the public examinations will be taking place, and that some creditors have indicated a wish to attend the public examinations.

12. The starting point, as Mr Robertson observed, is the statute. Section 597(4) provides:

"An examination is to be held in public except to such extent (if any) as the Court considers that, by reason of special circumstances, it is desirable to hold the examination in private."

13. The consequence is that, under current law, as has been the case for many years, examinations are to be held in public unless the Court considers, by reason of special circumstances, it is desirable to hold the examination in private.

14. Further, many examinations into the affairs of failed companies are apt to give rise to the prospect of litigation, including criminal prosecutions and litigation seeking the imposition of civil penalties, and s 597(12) makes it clear that the privileges against self-incrimination and against exposure to a penalty are not available to an examinee.

15. The reasons for the prima facie or default position of examinations being held in public have been explained at the intermediate appellate level by the unanimous decision of the Full Court of the Supreme Court of Victoria in *Friedrich v Herald and Weekly Times Ltd* [1990] VR 995 at 1001-1003. At the end of that passage, Kaye, Fullagar and Ormiston JJ said:

"There can be little doubt, therefore, that an examination in public, in contrast to one in private, is seen as the norm under the present legislation. One may venture some opinions as to why this is so. The legislature must have seen it to be desirable that, whenever an examination is ordered, it should be given as much publicity as the matter deserves. Since no dispute is resolved upon the hearing of an examination, the benefit must be seen in the general publication of the proceedings, whether by press, radio, television or by word of mouth. Not only might that lead to the possibility of further information being provided from other sources to the liquidator or other person in control of the company, but the risk that improper activities of company officers might thereby be spread abroad may have been thought as some form of deterrence to them: cf *McPherson on Company Liquidation*, 3rd ed, p 431. One may doubt that the more thick skinned of the company 'sharks' of this world would be especially conscious of the risk of examination, but at least the possibility of public examination may be seen as part of the price paid for the privilege of incorporation and the right to transact business as a company, albeit that the price is usually paid by those who become directors or officers of that company."

16. More recently, in *Evans v Wainter Pty Ltd* (2005) 145 FCR 176; [2005] FCAFC 144 at [91], Lander J said, with the agreement of Ryan and Crennan JJ:

"Part 5.9 contemplates that examinations under the Part should ordinarily be held in public. Section 597(4) recognises that it will often be desirable to inform the public of the matters inquired into: *Friedrich v Herald and Weekly Times Ltd* [1990] VR 995. If there are special circumstances the Court may order that the examination proceed in private but '... an order cannot be justified unless it be shown that the particular question and answer or even, arguably, some particular line of questioning will, if published, result in prejudice of a kind which outweighs the need for publicity which the legislature sees as forming an essential element of the purposes of examinations under s. 541': *Friedrich v Herald and Weekly Times Ltd* [1990] VR 995 at 1007.

17. Both parties direct me also to the judgment of Ward J, as her Honour then was, in *Wambo Coal Terminal Pty Ltd v Shepard* [2011] NSWSC 639; 84 ACSR 660, who at [53] noted what Campbell J had said in *Re Eurostar Pty Ltd (In Liquidation) (Receivers and Managers Appointed)* [2004] NSWSC 462 at [13]:

"Part of the purpose of conducting examinations in public is that there is a public interest in all aspects of the circumstances which led to a corporate collapse being available to all those who might be interested. Incorporation is a privilege which is made available because there is seen to be public benefit in it, but there is a public interest in that privilege not being abused. The privilege of incorporation is given on terms that, if the company collapses, its affairs can be examined, and that examination will ordinarily be in public. In at least some instances, publicity of information given in examinations can cause information which was otherwise not available to be brought to the attention of those investigating the circumstances of the corporate collapse. There

needs to be a good reason before full openness to public scrutiny of what is said in such examinations should be removed."

18. I accept the principles underlying all of those passages, namely, that Parliament regards publicity of the examination of the affairs of failed companies as important and beneficial, that the examinations should extend to obtaining answers to questions which would ordinarily be privileged, but that a court may intervene, on application, if special circumstances are shown.

19. In *Friedrich v Herald and Weekly Times Ltd*, Mr Friedrich, who had been the chief executive of the National Safety Council of Australia, had already been charged under s 82(1) of the *Crimes Act 1958* (Vic) with obtaining financial advantage by deception, for which the maximum penalty was 5 years' imprisonment. Some three weeks before the hearing in the Full Court of the Supreme Court of Victoria, Mr Friedrich was further charged, this time with 91 counts under section 81(1) of the *Crimes Act* of obtaining property by deception, the maximum penalty for each of those further charges was 10 years' imprisonment. The report records that the latter charges involved sums totalling some $244 million. Plainly enough, save perhaps for one thing, the factual circumstances which gave rise to Mr Friedrich's unsuccessful attempt to have the liquidator's examination that he faced held in private are substantially more powerful than those faced by Mr Iervasi, who (a) has not as yet been charged, (b) may not face charges for some substantial period of time, and (c) following his being charged and in the event that he pleads guilty to some or all of the charges there will be an inevitable further delay before any trial takes place.

20. I have also been taken to Young J's decision in *Corporate Affairs Commission (NSW) v Lombard Nash International Pty Ltd (No 4) (NSW)* (1987) 12 ACLR 475. Once again, this is a case where an officer of the company in external administration applied for a private examination and criminal proceedings were actually pending against that officer.

21. The circumstances relied on were summarised by Young J at 479:

"The circumstances that are said to be special in this case are that criminal proceedings are actually pending; the case is one where there has already been a large amount of publicity; it can be reasonable expected that if the examination is in public the public examination will be reported in the newspapers of this State, if not further abroad; the newspapers may not appreciate that an answer given under s 541(12) cannot be used in subsequent criminal proceedings; that, accordingly, there would be prejudice in the public mind and especially among potential jurors, if such answers, which could not be used in the criminal proceedings, were widely publicised. Furthermore, there is the possibility that someone not appreciating the niceties of s 541(12) may re-issue material about the public examination during the committal or during the trial and that the fair trial of the applicant will therefore not be able to take place. In addition it is put, though as a subsidiary matter, that whilst the whole policy matter is being considered by the Court of Appeal it may be better that the examination proceed at least in part in private rather than there be no examination at all."

22. As emerges from the last sentence of that passage, there were special considerations in that case, because of a pending appeal to the Court of Appeal on the operation of the provision, in relation to which a stay had been granted by Mahoney JA, and because of an undertaking not to ask questions which might "in any way prejudice the trial of any of the offences to which [the applicant was] presently charged": see at 476-477. His Honour was thus faced by a very different balancing process than what has been debated before me. This may also be seen at page 480, where Young J referred to balancing the interest of the public in being able to hear the examination and the risk of an adjournment of the examination which had been set down some 12 days after his Honour's decision.

23. What is put by Mr Hopkins is that circumstances today in the 21st century, with the internet and social media, are entirely different. He submits that a jury will be able to access, for the foreseeable future, any media reporting that is made of the questions and answers of which he will be asked next Monday. That is the gravamen of the prejudice of which complaint is made.

24. In my opinion it is a little too simplistic to proceed merely on the basis that jurors, if they so chose could access the mass media and social media publicity, which I accept if no order is made by this Court this afternoon is likely to accompany the examinations next week. The notion of serious criminal charges being laid and then adjudicated by judge and jury where the events giving rise to the criminality have already received substantial, and indeed potentially inflammatory, coverage on both conventional and more modern forms of mass media is a circumstance with which the criminal justice system is well acquainted. It is not uncommon for serious charges to be heard and determined by juries where there has been an enormous quantity of publicity at the time of the events and at the time of charges being laid. Some crimes of violence are captured on CCTV which is obtained by the media; some crimes involving fraud and abuse of power are the subject of widely publicised ICAC hearings. A variety of mechanisms are available to address these concerns, in the event that Mr Iervasi stands trial in the future. One, of course, is to ensure that the pool of jurors who are ultimately selected does not include anyone who is directly or indirectly affected by the scheme. Another, which is entirely conventional in criminal trials, because it is rare these days for there to be a criminal trial as to which there has not been at least some reporting of the circumstances giving rise to the criminality, the police investigation, and the charging of the accused, is a direction to jurors not to attempt to do their own research, but instead as best they can to adjudicate whether guilt has been shown beyond reasonable doubt in light of the evidence which ends up being admitted before them. A third, although speaking generally, it is an option reserved for more extreme cases (to be clear I am expressing no view whatsoever as to whether any criminal proceedings that might be laid against Mr Iervasi fall in this category), there is an opportunity to apply for a judge alone trial pursuant to s 132 of the *Criminal Procedure Act 1986* (NSW).

25. If there is to be a criminal trial, then the existing publicity which has been given to Mr Iervasi will warrant at least the first two of these measures. The special circumstances to which he points are thus not the risk to a jury trial occasioned by new adverse publicity where there is presently none, but rather further contributions to the highly critical material which is already available.

26. It was put by Mr Hopkins that at least some of those considerations, including the potential for a judge alone trial, involved looking too far ahead in determination of whether or not special circumstances should be made out. I reject that submission. The issue that Mr Iervasi needs to persuade this Court in the way that the submission has been made is whether, by risk of the prejudice to his important right to a fair trial, he has made out special circumstances such as to displace the default position that his examination be in public. In evaluating that submission, I think it is necessary to have regard not merely to the risk of prejudice to which he points, but also the various ameliorative steps that can, and in the ordinary course of things are, taken to address that risk.

27. A relatively minor point has been debated between the parties as to timing. It was probably provoked by a comment made by me. There has been no explanation for why the application which is being made late on a Friday afternoon on the Friday before the Monday on which the examination will take place, was not made at any earlier time in the last three months after 8 February when the summons was served. Mr Hopkins, after appropriate apologies, maintains this is not a matter that tells against his client. Mr Robertson says that had he had more notice – it is not disputed that the liquidators were advised of this application in the middle of today – he might have been able to adduce better evidence of the fact and reasons for the public interest in the public examinations. Although I am inclined to consider that on this minor issue Mr Robertson is correct and the unexplained delay in bringing the application is a matter to which I can have regard, on any event I am of the view that it is a minor matter and I propose not to have regard to it in making the orders that I propose to make. Rather, I propose to determine this application on the basis of the principal basis propounded by Mr Iervasi, namely, special circumstances arising solely from the risk of prejudice to his right to a fair trial.

28. Ultimately, I do not think that the circumstances of any of the cases to which I have referred provides powerful support to Mr Iervasi, because, although I am prepared to proceed on the basis that he will likely inevitable be charged, he has not to date been charged, and any prosecution is likely to be many months, if not years, in the future.

29. I should note one thing for clarity. The liquidators emphasised the use immunity provisions in s 597(12A). When read with subsection (12), it is plain that Mr Iervasi, no different from any other person examined under the section, must answer a question, even if his answer might tend to incriminate himself or render him or her liable to a penalty, but that if he so indicates, then any answer will not be admissible in evidence against him in a criminal proceeding or in a proceeding for the imposition of a penalty (save in the event of proceedings for perjury in his answers to the liquidator).

30. Hence, it is common ground, of course, that the questions and answers will never be able to be tendered at any criminal trial that is brought against Mr Iervasi. That is not an answer to the prejudice that Mr Iervasi points to, reiterating the point made by Young J reproduced above, because there is no reason – unless orders are made – preventing media from reporting the questions and answers.

31. Ultimately, the earlier decisions give a measure of guidance as to what is required for the "special circumstances" in s 597(4) and its predecessors to be made out. The decisions to which I have referred include decisions where examinees have in fact been charged and where any criminal trial was apt to be much more proximate to the examination than is the case in the present circumstances.

32. There is a further matter that bears upon the evaluation required by s 597(4). It strikes me as an unlikely result if it were the case that the mere high likelihood of criminal proceedings arising out of a corporate collapse would of itself amount to "special circumstances". The decisions to which I have already made reference indicate that that is not the position.

33. For those reasons, I am not persuaded that there has been shown to be the requisite special circumstances to order that the default position in s 597(4) should be displaced.

34. It follows that, I will dismiss paragraph 4 of the interlocutory process. Ultimately, it was accepted that the orders sought in paragraph 6 of the interlocutory process could not be maintained if I were not minded to make order 4.

35. Paragraph 5 of the interlocutory process is in a different category. It, unlike the balance of this application, need not be determined before 11 o'clock next Monday, because it is accepted that the formal transcript and authentication will not happen until some days after the completion of Mr Iervasi's examination.

36. Nothing I have said to date is intended to preclude a further application based upon paragraph 5 of the interlocutory process in relation to the transcript and, in particular, in relation to some specific portion of the examination.

37. I also propose, as discussed with counsel, to make orders permitting the parties to approach me on very short notice next week in the event that there is some particular aspect of the examination which should be the subject of special orders.

38. [Discussion as to form of orders and costs]

39. I make the following orders:

1. Dismiss the interlocutory process filed this afternoon.

2. Grant the parties liberty to apply to my Associate in the first instance on short notice for the period of the next seven days and thereafter on 24 hours' notice to the Company Judge.

3. The first defendant, Mr Iervasi, to pay the liquidators' costs of the interlocutory process.

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Amendments

25 October 2018 - Hearing date and decision date corrected.

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Decision last updated: 25 October 2018